

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION - CINCINNATI

STEVEN D. KING, )  
                    )  
Plaintiff,       ) TRIAL BY JURY DEMANDED  
                    )  
-vs-              ) CASE NO.: C-1-01-802  
                    )  
CSX TRANSPORTATION, INC. ) Judge Herman J. Weber  
a corporation,     )  
                    )  
Defendant.       )

**MOTION TO CONTINUE TRIAL**

NOW COMES the Plaintiff, Steven D. King, and hereby moves this Court to Continue the Trial in this matter and in support, thereof, states as follows:

1.     This matter is presently scheduled for a jury trial beginning on December 1, 2003. A final pretrial conference is scheduled for November 19, 2003.
2.     This lawsuit is brought pursuant to the Federal Employers Liability Act, 45 U.S.C. §51 *et seq.*, for injuries sustained by the plaintiff during the course of his employment with the defendant, CSX Transportation. Plaintiff has alleged that on or about March 12, 1999, he sustained a knee injury while attempting to board locomotive in Corbin, Kentucky.
3.     Plaintiff remains an employee of the defendant, CSX Transportation, and retains seniority rights as a locomotive engineer. However, due to the injuries sustained in the above referenced incident plaintiff has not worked as a locomotive engineer for the defendant since January of 2000.
4.     At the request of CSX Transportation, the plaintiff was examined by orthopedic

surgeon, Dr. Thomas Bender. At that time, Dr. Bender performed a physical examination of the plaintiff and also reviewed the medical records from plaintiff's treating physicians.

5. Dr. Bender has provided deposition testimony in this case. Dr. Bender testified that he has treated locomotive engineers such as the plaintiff in the past, has an understanding of their job duties, and that it is his expert medical opinion that the plaintiff is capable of performing the regular and routine tasks of a locomotive engineer for CSX Transportation. (Bender Evidence Deposition, p.25-26). Dr. Bender further testified that his opinion regarding the plaintiff's physical capability of returning to work is not at variance with the restrictions placed upon the plaintiff by the treating physician, Dr. Larkin. (Bender Evidence Deposition, p.26-27).

6. Plaintiff intends to attempt to return to work as a locomotive engineer for the defendant, CSX Transportation. On November 5, 2003 plaintiff had a follow up appointment with his treating physician, Dr. John Larkin, who has released him to return to work with no restrictions as of November 5, 2003. (See attached release from Dr. Larkin). Plaintiff will need to be re-certified as a locomotive engineer and also re-qualify to operate locomotives over his territory before he will be allowed to resume all of his regular duties as a locomotive engineer.

7. Plaintiff requests that the trial date of December 1, 2003 be stricken and that the trial in this matter be continued for a period of 90 days to allow plaintiff sufficient time to become re-certified, re-qualified and attempt to return to his position of locomotive engineer for the defendant, CSX Transportation.

8. The plaintiff's ability (or inability) to return to work for the defendant will be one of the primary issues at trial in this matter. Moreover, the plaintiff's economic losses will be

either reduced or increased depending upon whether he is capable of returning to his locomotive engineer position with the defendant.

9. This request for a continuation of the trial is made in the interests of justice and not for the purposes of harassment or undue delay.

10. It is expected that a resolution of the issues related to plaintiff's ability to return to work will simplify the issues to be determined at trial and facilitate a potential settlement of this matter.

11. Counsel for the defendant, James O'Connell, has been consulted with respect to this motion. However, as of the time of this filing Mr. O'Connell has been unable to contact his client to determine whether this motion will be opposed.

WHEREFORE, the plaintiff respectfully requests that the Court grant this motion and continue the trial in this matter for a period of approximately 90 days.

Respectfully submitted,

/s/ Robert E. Harrington, Jr.  
Robert E. Harrington, Jr.  
Patrick J. Harrington  
Daniel W. Pisani  
Attorneys for Plaintiff

Harrington, Thompson, Acker & Harrington, Ltd.  
310 South Michigan Avenue--Suite 2000  
Chicago, Illinois 60604  
(312) 922-8833

**CERTIFICATE OF SERVICE**

I, Robert E. Harrington, Jr., hereby certify that on November 5, 2003 a copy of the foregoing **Motion to Continue Trial** was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Robert E. Harrington, Jr.  
Harrington, Thompson, Acker & Harrington, Ltd.  
310 South Michigan Avenue  
Suite 2000  
Chicago, Illinois 60604  
(312) 922-8833



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JOHN J. LARKIN, M.D.  
G. AVERY KONDIK, P.A.-C.

320 Thomas More Parkway  
Crestview Hills, KY 41017  
(859) 426-4200  
(859) 426-4206 fax

Patient: Steve King Employer:  
Diagnosis: Paras Arachnoid Left Next Visit:  
Recommendations: None

## WORK STATUS

MAY RETURN TO WORK WITH NO RESTRICTIONS ON 11/5/03  
UNABLE TO WORK UNTIL

CONTINUE CURRENT WORK RESTRICTIONS UNTIL

MAY RETURN TO WORK ON

WITH THESE RESTRICTIONS:

Upper Extremity & Neck	No restrictions	None of this activity	Limited Restrictions	Lower Extremity & Back			No Restrictions	None of this activity	Limited Restrictions
				<input type="checkbox"/> Left	<input type="checkbox"/> Right	<input type="checkbox"/> Both			
Driving			Hrs/day: 1-2 3-4 5-6 7-8	Standing					Hrs/day: 1-2 3-4 5-6 7-8
Teaching			Hrs/day: 1-2 3-4 5-6 7-8	Bending/Stooping/Crouching					Hrs/day: 1-2 3-4 5-6 7-8
Climbing Ladders/Scaffold			Hrs/day: 1-2 3-4 5-6 7-8	Climbing Ladders/Scaffold					Hrs/day: 1-2 3-4 5-6 7-8
Operating Heavy Eqmnt			Hrs/day: 1-2 3-4 5-6 7-8	Driving					Hrs/day: 1-2 3-4 5-6 7-8
Overhead Activity/Lifting			Ibs times/day	Kneeling/Squatting/Crawling					Hrs/day: 1-2 3-4 5-6 7-8
Lifting to Waist Height			Ibs times/day	Operating Heavy Eqmnt					Hrs/day: 1-2 3-4 5-6 7-8
Pulling/Pushing			Hrs/day: 1-2 3-4 5-6 7-8	Sitting/Sedentary					Hrs/day: 1-2 3-4 5-6 7-8
Carrying			5lb 10lb 15lb 25+lbs	Pull/Push/Carrying pounds					Hrs/day: 1-2 3-4 5-6 7-8
Continuous/Repetitive			Hrs/day: 1-2 3-4 5-6 7-8	Lifting, Floor to Waist					Ibs times/day
Sitting/Sedentary			Hrs/day: 1-2 3-4 5-6 7-8	Twisting/Planting					
Other				Continuous/Repetitive					Hrs/day: 1-2 3-4 5-6 7-8
				Other:					

**Note:** If restrictions cannot be met, patient should be off work.

11/5/03

John J. Larkin, M.D.

G. Avery Kondik, P.A.-C.

Date

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1	---	1	INDEX
2	APPEARANCES	2	
3	On behalf of Plaintiff:	3	EXAMINATION BY: DIRECT CROSS REDIRECT RECROSS
4	PATRICK HARRINGTON, ESQ. of Harrington Thompson, Acker & Harrington, Ltd.	4	MR. O'CONNELL 5
5	310 S. Michigan Avenue	5	MR. HARRINGTON 28
6	Suite 2000	6	
7	Chicago, Illinois 60604	7	
8	On behalf of Defendant:	8	
9	JAMES O'CONNELL, ESQ. of Lindhorst & Dredame	9	
10	312 Walnut Street	10	
11	Suite 2300	11	
12	Cincinnati, Ohio 45202	12	
13	ALSO PRESENT: Paul Jahn, videographer	13	
14		14	
15		15	EXHIBIT MARKED
16		16	
17		17	
18		18	NO EXHIBITS MARKED
19		19	
20		20	
21		21	
22		22	
23		23	
24		24	
25		25	

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1	S T I P U L A T I O N S	1	MR. JAHN: We're on the record,
2	It is stipulated by counsel for the respective	2	Doctor.
3	parties that the deposition of THOMAS A. BENDER,	3	THOMAS BENDER, M.D.,
4	M.D., a witness herein, may be taken at this	4	a witness herein, of lawful age, having been
5	time by the defendant as upon direct examination	5	first duly sworn, as hereinafter certified, was
6	and pursuant to the Ohio Rules of Civil	6	examined and testified as follows:
7	Procedure and notice to take deposition, all	7	DIRECT EXAMINATION
8	other legal formalities being waived by	8	BY MR. O'CONNELL:
9	agreement; that the deposition may be taken in	9	Q. Let the record show that this is
10	stenotype by the Notary Public Reporter and	10	the videotaped deposition of Dr. Thomas A.
11	transcribed by her out of the presence of the	11	Bender being taken by the defendant in this case
12	witness; that submission of the deposition to	12	for presentation to the jury upon trial of this
13	the witness for examination and signature is	13	case.
14	expressly waived.	14	And let us begin, Doctor, by asking
15		15	you to state your name for the jury.
16		16	A. My name is Thomas Bender.
17		17	Q. What is your professional address?
18		18	A. My professional address is 3345
19		19	Whitfield Avenue, that's located in Cincinnati,
20		20	Ohio.
21		21	Q. And what is your profession?
22		22	A. I'm a Medical Doctor specializing
23		23	in orthopedic surgery.
24		24	Q. Are you authorized to practice
25		25	medicine in the State of Ohio?

2 (Pages 2 to 5)

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1 incident?

2 A. Not that I can say with certainty,  
3 although one is suspicious with the evolution of  
4 similar patella femoral problems on the right  
5 knee.

6 Q. And what were the similar patella  
7 femoral problems on the right side?

8 A. In the exam of 2003 he has early  
9 grading or popping under the right knee, which  
10 is more pronounced on the knee, left knee, which  
11 is claimed as a result of his employment.

12 Q. And in your opinion where did the  
13 findings on the right knee originate from?

14 A. I feel that's a degenerative  
15 condition.

16 Q. And if he had degenerative changes  
17 occurring on the right knee in your opinion did  
18 he have similar changes going on on the left  
19 side?

20 MR. HARRINGTON: There will be an  
21 objection.

22 A. I don't think I can answer that  
23 question with certainty so we'll have to  
24 withdraw that.

25 Q. What is Mr. King's present

1 patient did not have dysfunction or disability  
2 in the knee for which he wanted to repeat or  
3 engage treatment with a physician of record, Dr.  
4 Larkin, for the -- his knee injury. Dr.  
5 Larkin's function is what we call as the  
6 physician of record. He is the person whom you  
7 go back if you're having problems, and it's not  
8 evident that Mr. King went back to Dr. Larkin  
9 for a period of greater than 26 months.

10 Q. Have you reviewed Dr. Larkin's  
11 physical exam findings from the patient's seeing  
12 him in June of 2003?

13 A. Yes, sir, I have.

14 Q. And how do his findings at that  
15 time compare with your findings from a short  
16 time earlier in the same month?

17 A. We're within five degrees on range  
18 of motion testing. He had mild patella femoral  
19 crepitance on -- on the left knee exam, there  
20 was no focal tenderness on the patella femoral  
21 compression. Everything else about the knee is  
22 normal, and Dr. Larkin also noted the mild  
23 patella femoral crepitance on the right knee  
24 with exactly the same range of motion. So  
25 there's not a tremendous amount of dissimilarity

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1 diagnosis and prognosis?

2 A. The patient currently is  
3 symptomatic from -- from the patella femoral  
4 joint in the left knee. He has a good  
5 prognosis. He doesn't need additional surgery.  
6 This is something in which he should be  
7 encouraged to be active. He's had two minimally  
8 invasive surgeries to address this condition.

9 Q. When you say minimally invasive  
10 surgeries what do you mean by that?

11 A. Puncture wounds to look around the  
12 internal contents of the knee. If you look at  
13 the operative note or summaries not a tremendous  
14 amount of anatomical alteration was accomplished  
15 with either surgery.

16 Q. All right. Doctor, please assume  
17 that Mr. King visited with his then attending  
18 orthopedist, Dr. Larkin, in May of 2001 but did  
19 not return to him with any knee complaints until  
20 June of 2003, a little over two years later.

21 Is there any significance, in your  
22 opinion, in that the patient did not see his  
23 orthopedist for a period of about two years?

24 MR. HARRINGTON: Objection.

25 A. Yes, sir. It's evident that the

1 between the exam of the left knee and right knee  
2 by Dr. Larkin on this date of 6-16-03 --

3 Q. All right.

4 A. -- or whenever -- type 6-16-03.

5 Q. Doctor, what restrictions, if any,  
6 would you place on Mr. King's current work  
7 activities?

8 A. I think it's prudent for the man  
9 not to kneel, squat or crouch on a sustained or  
10 continuous basis. He may not be placed in a  
11 position where he would be going up and down  
12 ladders 15 or 20 feet or to an unprotected  
13 height. I think that he may have some  
14 difficulty with stair climbing on a repetitive  
15 basis but he could certainly do this several  
16 times a day.

17 Q. Have you examined and/or treated  
18 locomotive engineers in the past?

19 A. Yes, sir, I have.

20 Q. And do you have an understanding of  
21 their duties?

22 A. Yes, sir.

23 Q. Have you looked at the photographs  
24 marked Defendant's Exhibits B 1 through B 10,  
25 the photographs of the locomotive which Mr. King

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<p>1 was involved with at the time of his accident?</p> <p>2 MR. HARRINGTON: Objection.</p> <p>3 A. Yes, sir, I have looked at</p> <p>4 the pictures.</p> <p>5 Q. In your opinion is Mr. King capable</p> <p>6 of performing the regular and routine tasks of a</p> <p>7 locomotive engineer?</p> <p>8 A. Yes, sir.</p> <p>9 Q. I'm going to ask you to assume that</p> <p>10 Dr. Larkin has testified that he would limit Mr.</p> <p>11 King in only these respects: no repetitive</p> <p>12 kneeling, squatting and climbing, and I'll also</p> <p>13 ask you to assume that Dr. Larkin did not define</p> <p>14 repetitive as to number of times a task would be</p> <p>15 performed.</p> <p>16 In your opinion does your</p> <p>17 assessment that you just gave us that Mr. King</p> <p>18 is capable of resuming his work as a locomotive</p> <p>19 engineer, in your opinion is your assessment at</p> <p>20 variance with the restrictions put on the</p> <p>21 patient by Dr. Larkin?</p> <p>22 MR. HARRINGTON: Objection.</p> <p>23 Assumes facts not in evidence.</p> <p>24 A. No, sir. I reviewed Dr. Larkin's</p> <p>25 deposition, I know Dr. Larkin wasn't very clear</p>	<p>Page 26</p> <p>1 other words, his functional capacity evaluation</p> <p>2 was done about six months after the surgery by</p> <p>3 Dr. Larkin. This FCE was available in June</p> <p>4 2001.</p> <p>5 Q. And how does that compare with your</p> <p>6 assessment of the patient in June of 2003?</p> <p>7 MR. HARRINGTON: Objection.</p> <p>8 A. This man's come a long way since --</p> <p>9 in the two years since he had that functional</p> <p>10 capacity evaluation. It's also evident that the</p> <p>11 patient did not go back to Dr. Larkin</p> <p>12 immediately after this functional capacity</p> <p>13 evaluation. He's not even sure who even</p> <p>14 assessed it or reviewed it. There's no record</p> <p>15 of any change or recommendations by Dr. Larkin</p> <p>16 in terms of medical record in terms of the</p> <p>17 results of this functional capacity evaluation.</p> <p>18 Q. Dr. Bender, in your opinion does</p> <p>19 Mr. King currently need ongoing medical</p> <p>20 attention?</p> <p>21 A. No, sir.</p> <p>22 Q. Thank you, Doctor. I believe</p> <p>23 that's all the questions I have.</p> <p>24 CROSS-EXAMINATION</p> <p>25 BY MR. HARRINGTON:</p>
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<p>1 in terms of the frequency that he would allow</p> <p>2 the patient to get on and off the engine. Other</p> <p>3 than that I think my restrictions are comparable</p> <p>4 to those as offered by Dr. Larkin, and I will go</p> <p>5 further thinking this man can get off an engine</p> <p>6 several times a day.</p> <p>7 Q. And how about getting on an engine?</p> <p>8 A. Getting on and off an engine</p> <p>9 several times a day.</p> <p>10 Q. All right. Without waiving any</p> <p>11 objections that we might interpose to the</p> <p>12 functional capacity evaluation carried out at</p> <p>13 the direction of Dr. Larkin and to any</p> <p>14 evaluation of that by Dr. Best I want to ask you</p> <p>15 some questions about that functional capacity</p> <p>16 evaluation.</p> <p>17 First, have you had an opportunity</p> <p>18 to review that?</p> <p>19 A. Yes, I have.</p> <p>20 Q. Do you agree or disagree with the</p> <p>21 conclusions expressed in, in those reports?</p> <p>22 A. It's evident that the patient does</p> <p>23 have some continued deficits in left lower</p> <p>24 extremity and -- when he was seen six months</p> <p>25 after his second knee surgery by Dr. Larkin. In</p>	<p>Page 27</p> <p>1 Q. Doctor, my name's Patrick</p> <p>2 Harrington, one of the attorneys representing</p> <p>3 Mr. King. I have some questions for you today.</p> <p>4 Briefly, however, Mr. O'Connell, in</p> <p>5 his direct examination, asked you to state any</p> <p>6 opinions you would have in this case based upon</p> <p>7 a reasonable degree of medical certainty and I</p> <p>8 would ask that you afford me that same courtesy.</p> <p>9 All right, Doctor?</p> <p>10 A. Yes, sir.</p> <p>11 Q. I understand that of the</p> <p>12 approximate six times per year which you've</p> <p>13 provided medical legal evaluations for Mr.</p> <p>14 O'Connell or his firm each of those examinations</p> <p>15 were on the behalf of the defendant in the case;</p> <p>16 is that correct?</p> <p>17 A. Well, I've also evaluated people</p> <p>18 who were represented by their firm so I've given</p> <p>19 them opinions contrary to the members of the</p> <p>20 firms, as well.</p> <p>21 Q. Okay. And on an annual basis you</p> <p>22 perform approximately 300 medical legal</p> <p>23 examinations; is that correct?</p> <p>24 A. Yes, sir.</p> <p>25 Q. Vast majority of those are</p>
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IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
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STEVEN D. KING, )  
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Plaintiff,       ) TRIAL BY JURY DEMANDED  
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-vs-               ) CASE NO.: C-1-01-802  
                    )  
CSX TRANSPORTATION, INC. ) Judge Herman J. Weber  
a corporation,     )  
                    )  
Defendant.       )

**ORDER**

This cause coming to be heard on Plaintiff's Motion to Continue and the Court being sufficiently advised, it is hereby ordered:

The trial date of December 1, 2003 and final pretrial conference of November 19, 2003 are hereby stricken.

This Trial in the above styled cause is RESCHEDULED to the \_\_\_\_\_, 2004 trial term. Counsel shall file an amendment to their Joint Pretrial Order on or before \_\_\_\_\_, 2004.

IT IS SO ORDERED.

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Herman J. Weber, Senior Judge  
United States District Court